**The Mitigator**

Author(s): [Jeffrey Toobin](http://go.galegroup.com/ps/advancedSearch.do?inputFieldName(0)=AU&prodId=STOM&userGroupName=50548hhs&method=doSearch&inputFieldValue(0)=%22Jeffrey+Toobin%22&searchType=AdvancedSearchForm)

Source: [***The New Yorker***](http://go.galegroup.com/ps/aboutJournal.do?pubDate=120110509&actionString=DO_DISPLAY_ABOUT_PAGE&inPS=true&prodId=STOM&userGroupName=50548hhs&searchType=AdvancedSearchForm&docId=GALE%7C1161)***.*** 87.12 (May 9, 2011): p32.

Document Type: Article

**Full Text:** All rights reserved. Reproduced by permission of The Conde Nast Publications Inc.

Full Text:

The death penalty is withering, even in Texas. In the nineteen-nineties, juries in the United States handed down about three hundred death sentences per year; in 2010 there were only a hundred and fourteen. There were ninety-eight executions in 1999 and only forty-six last year. Earlier this year, Illinois became the sixteenth state to ban executions. The change has been especially striking in Houston, which has long reigned as the death-penalty capital of the nation. If Harris County, which includes Houston and its nearby suburbs, were a state, it would trail only the rest of Texas for the number of people executed. But last year prosecutors in Harris County sent only two people to death row.

Explanations for the change vary. Crime is down everywhere, and fewer murders means fewer potential death-penalty cases reaching the courts. Widely publicized exonerations of convicted prisoners, based on DNA evidence, may have given some jurors second thoughts about imposing the death penalty. Since 2005, jurors in capital cases in Texas have been given the option of imposing a sentence of life without the possibility of parole (known as LWOP), which appears to be viewed by many jurors as a satisfactory alternative. The cost of death-penalty prosecutions, which are longer and more complicated than other cases, has also brought the numbers down in recent years. A 2008 Maryland study by the Urban Institute estimates that the total costs of death-penalty cases are about three times as much as life-in-prison cases. Another explanation for the decline in death sentences has been the increasing use of mitigation, a strategy that aims to tell the defendant's life story.

When the Supreme Court allowed executions to resume, in 1976, after a four-year hiatus, the Justices mandated a two-phase structure for death-penalty trials that has become familiar in subsequent decades. The "guilt phase" would determine whether the prosecution established beyond a reasonable doubt that the defendant committed the charged capital offense. Following a conviction, the "penalty phase," a separate mini-trial before the same jury, would consider whether the defendant should be sentenced to death. To make that determination, the Court sought to insure that jurors follow a rational process, rather than make a snap judgment about whether a defendant should live or die. This system, which became known as "guided discretion," required jurors to weigh "aggravating factors" and "mitigating factors."

"As we in local communities began to look for mitigation, we saw it as presenting the narrative of someone's life, and we became acutely aware that it was a very specialized, complex undertaking," Scharlette Holdman, a pioneer in the field, said. (One of her clients was Ted Kaczynski, the Unabomber.) "That narrative is not there for the asking," she continued. "It requires not just knowledge and skill but experience in how you search for, identify, locate, recognize, and preserve the information."

The national embarrassment of the sleeping-lawyer case prompted a successful push for reform in Texas. In 2001, the legislature passed the Texas Fair Defense Act, which set certain basic standards for lawyers appointed to represent indigent defendants. Likewise, the Texas Defender Service, a nonprofit founded in 1995, built on the momentum generated by the Burdine case to become a significant force for training and assisting death-penalty lawyers.

Most important, perhaps, there have been changes in the way prosecutors in Texas use the death penalty, especially in Harris County. For three decades, the district attorney's office was run by two of the most zealous death-penalty supporters in the nation. It was largely because of Johnny Holmes, who served from 1979 to 2000, and Chuck Rosenthal, who succeeded Holmes, that Harris County earned its reputation as the death-penalty capital of the country. After his retirement, Holmes wrote in Texas Monthly, "When one of the national television news programs was pushing me about why we sent so many people to death row, I told the anchor that it's nobody's business but Texans'. I said, 'I don't give a flip how you all feel about it.' "

In some respects, Texas has become chastened about capital sentences. DNA exonerations, many of them uncovered by the Innocence Project, continue to embarrass prosecutors. (Nationwide, the Innocence Project has helped win the release of seventeen prisoners from death row.) The situation was especially bad in Houston, where the local crime lab spent much of the last decade enmeshed in scandals caused by incompetence.

The Colorado method is another important factor in the decline of the death penalty nationwide. In jury selection, the members of the defense team rate each prospective juror from one to seven, from best to worst for the defense. The defense goes with the jurors with the lowest scores. In the Colorado method, attitude toward the death penalty trumps every other factor usually associated with jury selection--race, ethnicity, occupation, education. In the Quintero case, the defense gave the jurors what Lane called a juror's bill of rights. "You tell the jurors that mercy is a perfectly appropriate reason to give a life sentence to someone; that they are never required to impose a death penalty; that they never even have to articulate a reason why they vote for life. No one else has to agree with you," Lane said. "You don't have to be able to write it down. You don't have to defend it to others. You can do it for any reason or no reason. We empower the jurors to know their right to show mercy."

**Source Citation**

**Toobin, Jeffrey. "The Mitigator." *The New Yorker* 9 May 2011: 32. *Student Edition*. Web. 12 Jan. 2012.**